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Before the  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.-CONTROL-  
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL.

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EVIDENCE AND ARGUMENT IN OPPOSITION

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Attorney for Jay L. Schollmeyer

Due Date: March 4, 2008

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Jay L. Schollmeyer,<sup>1/</sup> for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits this evidence and argument in opposition to the application, in accordance with the Board's Decision No. 4, dated December 21, 2007 (served December 27), 73 Fed. Reg. 923-30 (Jan. 4, 2008).

The verified statement of Jay L. Schollmeyer is attached hereto.

The preliminary conclusions of the Board, by which it may "authorize" the transaction in two stages, are insupportable. The Board would authorize the transaction subject to the conditions that (1) notice of intent to commence construction of the new rail line approved in DM&E PRB Construction be given prior to commencing construction of the line, so that environmental review of the proposed control transaction could begin; and (2) applicants may not transport coal unit trains originating on the new

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<sup>1/</sup> General Chairman for United Transportation Union on lines of BNSF Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver WA 98660.

rail line over lines currently operated by IC&E and/or CPR until the Board has prepared an EIS, and issued a final decision addressing environmental impacts and allowed such operations to begin. (Decision No. 4, 15).

Thus, the Board preliminarily concludes that it may approve the application under 49 U.S.C. 11324 without any environmental analysis; however, in the future, certain coal transportation would be the subject of an EIS, and a final decision issued addressing the environmental impacts of the coal operations and allowing such operations to begin.

The Board's preliminary conclusions would appear to separate the proceeding into "transportation" and "environmental" phases, with the statutory findings under 49 U.S.C. 11344, et al. initially directed to the entire transaction, including any future coal transportation; then, in the future, there may be an environmental proceeding with an EIS, involving unit train coal transportation, and a decision addressing such impacts and allowing operations to begin.

The procedure appears patterned upon the methodology employed by the Board in denying a stay in F.D. No. 34177, Iowa, Chicago & Eastern Railroad Corporation-Acquisition and Operation Exemption-Lines of I&M Rail Link, LLC, 15-17 (served July 22, 2002), and modified by decision served October 18, 2006.<sup>2/</sup> However, UTU/GO-386 is unable to find any credible authority for bifurcating the decisional and environmental process in the manner preliminarily proposed. Moreover, the Board's proposed condition (Decision 4,

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<sup>2/</sup> Decision No. 4, 12/27/07, pp. 12-13.

15) does not contain the "complete record" language of the F.D. No. 34177 condition, as modified October 18, 2006.

1. The Board is unclear whether the subsequent environmental proceeding and "allowing such operations to begin," is to involve at a later date an entirely new analysis of the control application under 49 U.S.C. 11324 along with the environmental concerns. It is the position of UTU/GO-386 that the subsequent proceeding must involve both the so-called "transportation" and "environmental" aspects of the application. In short, if the Board opts to accord quick approval now for the control application, excluding coal transportation and without further environmental analysis, then the agency later on must begin, de novo, with a full proceeding under 49 U.S.C. 11324, to consider both the "transportation" and "environmental" issues surrounding coal transportation, if applicants should desire to seek authority to transport coal in unit trains from DM&E origins..

2. UTU/GO-386 does not believe the above bifurcation process to be proper or desirable. In essence, it would restrict operating authority in much the same manner as former motor carrier operating certificates; however, the agency cannot escape responsibility for statutory findings under 49 U.S.C. 11324 for coal transportation, and must accord due process. The better path is to require a complete EIS at this time, and a complete transportation and environmental analysis at this time under the statute.

3. Of course, approval of the transaction at this time with the proposed restrictions again coal transportation, would effectively allow applicants to preclude any other rail carrier from the involved coal transportation market.

4. On the merits, and on the present record, the Board should find that there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation throughout the midwest region of the U.S, and that such anticompetitive effects outweigh the public interest in meeting significant transportation needs.

Respectfully submitted,



GORDON P. MacDOUGALL  
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March 4, 2008

Attorney for Jay L. Schollmeyer

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record on the Board's service list, and upon the following, by first class mail postage-prepaid:

U.S. Secretary of Transportation  
1200 New Jersey Ave., S.E.  
Washington DC 20590

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Gordon P. MacDougall

Washington DC

**VERIFIED STATEMENT  
OF JAY L. SCHOLLMAYER**

My name is Jay L. Schollmeyer, with offices at 400 East Evergreen Boulevard, Vancouver, WA. I serve as General Chairman for United Transportation Union (GO-386), representing train and engine service personnel employed by Burlington Northern Railway Company (BNSF).

My employment with BNSF, and its predecessors, commenced in 1974, in the MofW department; beginning 1978, I transferred to the operating department, and held successive positions from Brakeman to Conductor.

I have been a member of the UTU since 1978, becoming Local Chairman in 1996. Subsequently, I was elected Vice General Chairman, serving in that capacity from 1999 through 2007. I was elected General Chairman effective January 1, 2008, upon the elevation of John D. Fitzgerald to the position of UTU Vice-President.

From my experience in BNSF's MofW Operating Department, services as Brakeman and Conductor, along with assisting my General Committee (UTU/GO-386) in arbitration, agreements, and research projects, I have become fully familiar with BNSF operations and BNSF/UTU issues, along with relationships with other and connecting rail carriers.

I have examined the application, filed December 5, 2007, by Canadian Pacific Railway Company (CPRC), Soo Line Holding Company

(SOO Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Iowa, Chicago & Eastern Railroad Corporation (IC&E), for SOO Holding (and indirectly CPRC) to control DM&E and IC&E.

CPRC and its U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo) and Delaware and Hudson Railway Company, Inc. (D&H), collectively CPR, operate a transcontinental rail network in Canada and the U.S. As indicated on its service map (Appl. Ex. 1-B), the major CPR lines enter the U.S. on the west at Portal, ND, and Noyes MN, and extend between Minneapolis-St. Paul, Milwaukee, and Chicago, on the west, and Detroit, Buffalo, Binghamton, Albany, Philadelphia, Louisville, and New York, on the east, with lines reaching Rouses Point, NY. near Montreal, ON. In the western U.S., CPR connects with U.S. lines at various border points, such as Sumas, WA, Eastport, ID, and Sweet Grass, MT.

1. I oppose CRP acquiring DM&E and IC&E. It would be adverse for BNSF train and engine service employees. The present DM&E/IC&E operation appears that of a combined regional carrier. It is my understanding that the STB permitted IC&E to acquire the I&M Rail Link properties, which was accomplished July 30, 2002; thereafter, the agency approved DM&E control of IC&E, which was consummated March 5, 2003. However, the competitive situation facing BNSF employees will be even more severe if the DM&E/IC&E regional service should come under the control of a major Class I transcontinental carrier, such as CPR. DM&E/IC&E traffic which presently is subject to interchange with BNSF, or which could be interchanged with the BNSF in the future, would be subject to diversion to CPR routes. The CPR system is very extensive, and is highly

competitive with BNSF routes, throughout the U.S., as well as on export and import business.

2. I understand the STB has preliminarily suggested that the STB might approve this application for CPR system control of DM&E and IC&E, subject to the condition that applicants may not transport coal unit trains originating on the proposed DM&E new rail line, over IC&E or CPR lines, pending a further STB environmental study, and approval. STB Decision No. 4, December 27, 2007, at page 15:

Applicants may not transport coal unit trains originating on the new rail line approved for construction in DME PRB Construction over lines currently operated by IC&E and/or CPR until the Board has prepared an Environmental Impact Statement, and has issued a final decision addressing, the environmental impacts of such coal operations and allowed such operations to begin.

Prior to commencing any construction of the new rail line approved in DME PRB Construction, Applicants shall notify the Board of Applicant's intent to begin construction, and shall submit to the Board reasonably foreseeable projections regarding the movement of DM&E PRB coal traffic on the rail lines of ICE and/or CPR, so that the environmental review can begin.

I do not believe such post-consummation environmental condition should serve as a substitute for an analysis and findings as to whether the transaction should be approved in the first place under the relevant statutes, subject to the appropriate environmental conditions. Contentions and issues which may arise in the post-consummation environmental analysis, may have an important bearing upon whether the transaction should have been approved at all under the anti-competitive and public interest standards.



My UTU unit has certain experience regarding the interplay between "anticompetitive/public interest" and "environmental" criteria. In dealing with an application by Tongue River Railroad Company to construct rail lines in the PRB, the STB first considered approving the project on "transportation" issues, and then dealing with "environmental" issues. However, the agency subsequently evaluated the project from a transportation standpoint only after performing the environmental analysis.

Certain facts may become apparent only in the process of the environmental analysis, yet such facts may be important in determining the competitive and public interest issues. Moreover, I am unable to request appropriate employee conditions from the STB for my UTU membership in the absence of a full understanding as to the probable consequences of the transaction upon BNSF employees.

#### VERIFICATION

STATE OF WASHINGTON  
CLARK COUNTY

I hereby affirm I have read the foregoing verified statement, know the contents thereof, and that the same are true as stated.



JAY L. SCHOLLMAYER

Dated at  
Vancouver WA  
March 4, 2008